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No. 96-1303

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CITY OF DANVILLE, KENTUCKY - - *Petitioner*

versus

KENTUCKY RIVER AUTHORITY, Et Al. - - - - *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF IN OPPOSITION

JACK B. BATES
Counsel of Record
DONALD S. DOTT, JR.
SUSAN ROSE GREEN
Natural Resources and Environmental Protection Cabinet
Office of Legal Services
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-5576
Counsel for Respondents

March 17, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

27 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Statutes and regulations of the Kentucky River Authority ("the Authority") provide *inter alia* that users of the Kentucky River basin's waters shall pay water use fees which fund the Authority, its projects, and watershed management and protection programs.

The questions presented are:

1. Whether the Kentucky Court of Appeals decision upholding the Authority's water use fees is based on independent and adequate state ground thus precluding this Court's certiorari jurisdiction.
2. Whether the Authority, a legislatively created watershed management and protection agency, may lawfully impose water use fees upon the petitioner which actually withdraws from and discharges into the waters of the Kentucky River basin.
3. Whether special assessments law or the 5th and 14th Amendments are applicable to this case in lieu of the state rule of *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958).

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CITY OF DANVILLE, KENTUCKY - - - *Petitioner*

versus

KENTUCKY RIVER AUTHORITY,
PHILLIP J. SHEPHERD,
CHARLES W. CARR,
TOM DORMAN,
JUDGE W. NEAL CASSIDY,
DR. DONALD C. HANEY,
MARTIN HOWARD LOWRY,
EDWARD FOREE,
GREG GINTER,
THOMAS M. JONES,
RALPH E. MCCLANAHAN, and
BETTY F. WHITAKER, - - - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Kentucky River Authority, et al., ("the Authority") respectfully request that the petition for writ of certiorari be *denied* for the reasons set forth herein. Reasons for denial include lack of certiorari jurisdiction.

OPINIONS AND ORDERS ENTERED

1. An Order Denying Discretionary Review was entered by the Kentucky Supreme Court in *City of Danville* v. *Kentucky River Authority, et al.*, No. 96-SC-214-D, on November 13, 1996. The text is reprinted at page 1a of the petition appendix ("Pet. App.").

2. An Opinion Reversing and Remanding was entered by the Kentucky Court of Appeals in *Kentucky River Authority* v. *City of Danville*, No. 95-CA-000064-MR, on February 16, 1996. The text is reprinted at Pet. App., pages 2a through 7a. The opinion was published as *Kentucky River Authority* v. *City of Danville*, Ky. App., 932 S.W.2d 374 (1996).

3. An Order Denying Transfer was entered by the Kentucky Supreme Court in *Kentucky River Authority, et al.* v. *City of Danville*, No. 95-SC-52-T, on March 14, 1995. The text is reprinted herein at page 1a of the Respondents' Appendix ("Resp. App.").

4. An Opinion and Order was entered by the Boyle Circuit Court, in *City of Danville* v. *Kentucky River Authority, et al.*, Civil Action No. 94-CI-00278, on December 9, 1994. The text is reprinted at Pet. App., pages 8a through 11a.

JURISDICTION

The petition claims to invoke this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). However, the writ should be denied because the Kentucky Court of Appeals decision is based on independent and adequate state ground. *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *International Longshoremen's Association, AFL-CIO* v. *Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). The adequacy and independence of state law is clear from the face of the opinion. Granting a writ therefore would violate this Court's jurisdictional prohibition.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Kentucky Revised Statutes (KRS): 151.700 - 151.730 and 151.990. The approximate texts are reprinted at Pet. App., pages 12a through 23a.

2. Kentucky Administrative Regulations (KAR): 420 KAR 1:010, 420 KAR 1:020, 420 KAR 1:030, 420 KAR 1:040, and 420 KAR 1:050. The approximate texts are reprinted at Pet. App., pages 24a through 49a.

3. Kentucky Constitution § 2: *Absolute and arbitrary power denied.* - Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

4. 14th Amendment, U.S. Constitution. The approximate text is reprinted in part at page 2 of the petition.

COUNTERSTATEMENT OF THE CASE

The Kentucky River basin is a watershed which encompasses all geographic areas of the Commonwealth of Kentucky that are drained by the Kentucky River and its tributaries, including surface water and groundwater. 420 KAR 1:010 Section 1(17). The Kentucky River basin is located wholly within the state of Kentucky. The petitioner withdraws water from a major tributary of the basin, namely the Dix River at an impoundment known as Lake Herrington. Both Herrington and the Dix are waters of the Commonwealth and are part of the Kentucky River watershed. KRS 151.120(1). Also, the petitioner discharges from its waste water treatment plant into the Kentucky River basin. Thus, under the statute and the regulations, the petitioner "uses" the Kentucky River basin's waters. KRS 151.720(5); KRS 151.723; 420 KAR 1:010, Section 1(40).

Pursuant to the statutes and regulations, the Authority charges water use fees for the use of the Kentucky River basin's waters. KRS 151.720(5); 151.723; 420 KAR

1:040, Section 2. The water use fees charged to the petitioner and other water users are calculated based upon the actual quantities of water withdrawn from the basin. 420 KAR 1:040, Section 2(2). The petitioner, for example, withdraws over 3 million gallons of water daily, consumes or sells the withdrawn water, and discharges its treated waste water back into the watershed. The fee rate charged to the petitioner has been set by administrative regulation at 2.2 cents per 1,000 gallons of water withdrawn. 420 KAR 1:040, Section 4. In the previous legislative biennium state budget, the initial fee rate was 2.8 cents per 1,000 gallons. *Id.* The statute allows the petitioner to "pass on" the fees to its water customers. KRS 151.720(5).

The fees are used to fund the Authority, its projects to enhance the water supply in the basin, and for watershed protection. The fees are used for no other purpose. The Kentucky River watershed is eastern and central Kentucky's largest water resource.

Since the Authority began collecting water use fees in 1994, the petitioner has continued to resist the Authority's statutes and regulations and refuses to pay the fees. In fact, the petitioner initiated this litigation to challenge those fees. In its factual statement, the Kentucky Court of Appeals succinctly summarized this case:

> The controversy in this case arises from the Authority's interpretation of its enabling statute Ky. Rev. Stat. (KRS) 151.720, which was enacted in response to continuing problems and potential depletion of a valued natural resource, the Kentucky River. In 1990, the General Assembly enacted KRS 151.720 which mandates that the Authority protect the Kentucky River basin through watershed management. In 1993, the Authority enacted administrative regulations to implement the statutes including a two-tier fee schedule by which it charged the users of water from the river basin. Tier II fees are collected from entities with-

> drawing water directly from the main stem of the Kentucky River and are used by the Authority to finance specific capital construction projects designed to enhance the water available for the basin. Tier I fees, which Danville is designated to pay, apply to entities withdrawing water from anywhere in the basin, whether from groundwater or tributaries. These fees are used for projects benefiting the entire basin and are assessed at a uniform rate based upon use of the Kentucky River basin. They are not used for the general fund[1] but only for Kentucky River basin management.
>
> Danville withdraws no water directly from the Kentucky River but does from Lake Herrington on the Dix River which is a Kentucky River tributary. It also discharges water from its waste water treatment plant into a Kentucky River tributary.

Opinion, Pet. App., pp. 2a - 3a. In reaching its decision upholding the fees, the court followed an unbroken line of state case law which began with *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958). The court directly quoted the rule of *Curtis*:

> The fee in this case is based upon the actual use by the city of the Kentucky River water basin. Despite the city's contention that it does not need the services of the Authority, the General Assembly recognized a potential depletion of one of this state's most valued natural resources and took efforts to preserve the Kentucky River basin. The interest of the Commonwealth

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[1]The term "general fund" refers to the Commonwealth of Kentucky's treasury. The Authority is self-sustaining and wholly independent of the general fund. The water use fees collected by the Authority are placed into a restricted funds account for use only by the Authority for its watershed management and protection programs. KRS 151.723(3).

> in protecting Eastern Kentucky's largest water resource is beyond question. An adequate and clean water resource is essential to all it serves. In *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958), the court rejected the contention that a statute was unconstitutional because it conclusively presumed that all land within a designated area would benefit from a surface drainage improvement.
>
> > We think that in the case of a surface drainage improvement area, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general enhancement of conditions of health, comfort and convenience in the area and the resulting general enhancement of values in the area.
>
> *Id.* at 382.

Opinion, Pet. App., pp. 5a - 6a. Under the rule of *Curtis* the Court of Appeals reversed the local trial court which had ruled that the Authority's fees were unconstitutional as lacking in *special* benefits to the petitioner. The petitioner and the trial court believed that special benefits were required pursuant to special assessments law and due process, as in the special assessments cases of *Village of Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), *Barfield* v. *Gleason*, 111 Ky. 491, 63 S.W.2d 964 (1901), and *Casey* v. *Richland County Council*, 282 S.C. 387, 320 S.E.2d 443 (1984). The Kentucky Court of Appeals, however, rejected the notion that special benefits law applied to this water use fee case. Rather, under *Curtis* sufficient general benefit inured to the petitioner as a matter of Kentucky law. In following *Curtis* the court stated:

> Preservation of the Kentucky River basin is a benefit which obviously accrues to all within its boundaries.

> We therefore hold to be clearly erroneous the trial court's finding that no benefit to the City of Danville exists. *Yount* v. *Calvert*, Ky. App., 826 S.W.2d 833 (1992).

Opinion, Pet App., p. 6a. It is from the Kentucky Court of Appeals' application and adherence to the state rule of *Curtis* that the petitioner complains. The only federal questions determined by the court appear at the end of its opinion and relate to the petitioner's Commerce Clause and Supremacy Clause arguments. Therein the court summarily stated:

> We find no merit in Danville's contention that the Commonwealth cannot claim ownership to the waters of the Kentucky River because of the Supremacy Clause and the Commerce Clause of the United States Constitution. A state has power to control and conserve its water resources, and unless Congress expressly invokes the navigational servitude, the state has authority to control its internal waters. *City of Trenton* v. *New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *California* v. *United States*, 438 U.S. 645, 662, 98 S.Ct. 2985, 2994, 57 L.Ed. 1018 (1978).

Opinion, Pet. App., p. 7a. These issues, however, are not raised in the petition.[2]

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[2]Pursuant to Rule 15.2, the Authority notes certain inaccuracies in the petition. For example, the statement that the Authority "agreed" that the fees are a "special 'assessment' or 'user fee' for which a commensurate or proportional benefit must be conferred" is erroneous. Pet. Br.., p. 22. Also, the Authority is not a watershed management *district*. Pet. Br., p. 4. Tier I fees are *not* merely "assessed for the purpose of funding administrative expenses." Pet. Br., p. 4. The Kentucky General Assembly determines the Authority's budget and oversees the setting of the fee rates under KRS 151.723. Pet. Br., p.5. And, the petitioner is not assessed fees "based solely on its geographic location." Pet. Br., p. 12.

Presently pending before the state trial court is the Authority's motion for entry of a judgment consistent with the Kentucky Court of Appeals opinion.

* * *

REASONS FOR DENYING THE WRIT

I. THE KENTUCKY COURT OF APPEALS DECISION IS BASED ON INDEPENDENT AND ADEQUATE STATE GROUND AND UNDER *MICHIGAN* V. *LONG* THIS COURT HAS NO CERTIORARI JURISDICTION.

As to the issues claimed by the petitioner, the Kentucky Court of Appeals decision is based on independent and adequate state substantive law.[3] The most pivotal state authority on which the decision is based is the rule of *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 311 S.W.2d 378 (1958), quoted above. The petitioner's claim that the court decided an "important federal question" is erroneous. Rather, the court correctly applied and followed state law.

The law is clear that where independent and adequate state ground for the decision plainly exist this Court has no jurisdiction. *Michigan* v. *Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983); *International Longshoremen's Association, AFL-CIO* v. *Davis*, 476

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[3]The petition is procedurally misdirected. Under 28 U.S.C. § 1257, the petition should not be directed to the Kentucky Supreme Court but rather to the Kentucky Court of Appeals. Moreover, the petitioner requests this Court to issue a writ to the Kentucky Supreme Court for its refusal to grant discretionary review. Such refusal is clearly not reviewable. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160, 74 S.Ct. 396, 397, 98 L.Ed. 583 (1954); *Hammerstein* v. *Superior Court of California*, 341 U.S. 491, 492, 71 S.Ct. 820, 821, 95 L.Ed. 1135 (1951).

U.S. 380, 387, 106 S.Ct. 1904, 1910, 90 L.Ed.2d 389 (1986). *See also Coleman* v. *Thompson*, 501 U.S. 722, 729-730, 111 S.Ct. 2546, 2553-2554, 1152 L.Ed.2d 640 (1991). The Kentucky Court of Appeals decision indicates clearly and expressly that the issues in the case were decided on state substantive law. Indeed, from the face of the state court opinion it is plainly clear that no federal issue as claimed in the petition played any role in the court's decision. *Cf: Kentucky* v. *Stincer*, 482 U.S. 730, 735, 107 S.Ct. 2658, 2662, n. 1, 96 L.Ed.2d 631 (1987) (certiorari granted where the 6th Amendment was expressly interwoven in the Kentucky court's decision, comparable to the presence of *Terry* v. *Ohio* and the 4th Amendment in *Michigan* v. *Long*); *New York* v. *Class*, 475 U.S. 106, 109-110, 106 S.Ct. 960, 963-964, 89 L.Ed2d 81 (1986) (certiorari granted where the state court opinion cited and discussed federal and state law and the opinion lacked the requisite "plain statement" under *Michigan* v. *Long* that the decision rested on state grounds); and *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 625, 109 S.Ct. 2037, 2049, 104 L.Ed2d 696 (1989) (certiorari granted where the Arizona court opinion focused on federal statutes and "did not divorce the state constitutional issue from the questions of federal law.")

As to the petitioner's claimed 5th and 14th Amendment issues, *no* federal law is discussed or even cited by the Kentucky Court of Appeals. Instead, the only federal law discussed in the opinion relates to the Commerce Clause and Supremacy Clause arguments by the petitioner which were summarily found to have "no merit" by the court. Opinion, Pet. App., p. 7a. Those issues, however, are *not* part of the petitioner's concerns.

The Kentucky Court of Appeals opinion is replete with references to state authority. For example, the Kentucky Court of Appeals' reliance on *Commonwealth, ex rel. Armstrong* v. *Collins*, Ky., 709 S.W.2d 437 (1986), stands

for the fundamental rule under the Kentucky constitution that the legislature is vested with the authority to amend its statutes through its appropriations power. Relying on this state rule, the court properly rejected the petitioner's claim that the legislature could not amend the Authority's statutes by using the state budget bill to specifically direct some of the water use fees toward establishment of an operational staff to carry out the Authority's duties and responsibilities.

The only other specific constitutional matters, cited by the court were Sections 27 and 28 of the Kentucky Constitution. Those sections provide that taxation is an exclusively legislative function for raising revenue for the state's general fund and cannot be undertaken by an administrative body of the executive branch of government. This state principle is echoed in *Long Run Baptist Association, Inc.* v. *Louisville and Jefferson County Metropolitan Sewer District*, Ky., 775 S.W.2d 520 (1989), which is cited in the court's opinion.

> Indeed, taxation is a legislative function which if delegated to MSD would violate Sections 27 and 28 of the Kentucky Constitution. Therefore, if MSD's drainage charge is determined to be a tax, it must be adjudged to be illegal.

Id., at 522. The Court of Appeals reliance on established state law principles in *Long Run* underscores the court's construction under Kentucky law that the Authority is not a legislatively created taxation district and that the Authority's fees cannot be equated with taxes.

> The fees imposed by the Authority for the purpose of fulfilling the statutory mandates cannot be equated with taxes. The funds generated from the fees are to be used for the specific purpose of conserving and controlling the waters in the Kentucky River basin and are incidental to the statute.

Opinion, Pet. App., p. 5a. An additional demonstration of the Kentucky Court of Appeals' reliance on state law is shown by the court's citations to three other Kentucky cases.

> Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property without just compensation. *See Skidmore* v. *City of Elizabethtown*, Ky., 291 S.W.2d 3 (1956), *Portwood* v. *Falls City Brewing Company*, Ky., 318 S.W.2d 535 (1958), and *Woolsley* v. *Big Reedy Creek Watershed*, Ky., 383 S.W.2d 135 (1964).

Opinion, Pet. App., p. 5a. These cases reflect the court's reliance on established Kentucky law that fees having a reasonable relationship to benefits received are not arbitrary and capricious and therefore not unconstitutional. Where a reasonable relationship exists, as in the case at bar, the fees do not violate equal protection, due process or the prohibition against taking private property without just compensation. Although not expressly articulated by the court's opinion, the concept of "arbitrary and capricious" is a fundamental Kentucky legal principle which is rooted in Section 2 of the Kentucky Constitution. Moreover, Section 2 "is broad enough to embrace the traditional concepts of both due process of law and equal protection." *Kentucky Milk Marketing and Antimonopoly Commission* v. *Kroger Co.*, Ky., 691 S.W.2d 893, 899 (1985). It would also appear from *Woolsley* v. *Big Reedy Creek Watershed*, *supra*, at 137, that Kentucky's highest court views the state constitution as encompassing the concept of takings.

Nevertheless it is indeed plainly clear from the Kentucky Court of Appeals decision that it is based independently and adequately on state law and does not involve the federal constitutional issues which are trumpeted by the petitioner. Nowhere in the court's decision is any fed-

eral law discussed or even referenced, except as to the Supremacy and Commerce Clause arguments which the court summarily rejected as having "no merit" and which the petitioner does not contest. Opinion, Pet. App., p. 7a. Nor are there any federal questions as claimed by the petitioner that are interwoven in the decision as they were in *Kentucky* v. *Stincer, supra, New York* v. *Class, supra,* or *ASARCO, Inc.* v. *Kadish, supra.* Nor is there any indication that the court has attempted to thwart this Court's certiorari jurisdiction by sanitizing the alleged federal issues and improperly basing its ruling only upon state law. Surely this Court should defer to the state substantive grounds of the court's decision. *See* Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 4020.

Clearly, lack of a federal question determination is fatal to certiorari jurisdiction and the writ therefore should be denied. Moreover, even if the Commerce and Supremacy Clause arguments which were rejected by the Kentucky Court of Appeals could be construed as invoking certiorari jurisdiction, the Kentucky Court of Appeals decision rests on state law ground that is nonetheless independent of the federal questions and clearly adequate to support the judgment. *See Coleman* v. *Thompson, supra,* at 729-730. Nor does this Court "review federal issues that can have no effect on the state court's judgment." *International Longshoremen's Association, AFL-CIO* v. *Davis, supra,* at 387.

II. NO COMPELLING REASONS EXIST FOR THIS COURT'S REVIEW, NO IMPORTANT FEDERAL QUESTIONS WERE DECIDED, AND NO CONFLICT IN FEDERAL LAW EXISTS.

U.S. Sup. Ct. Rule 10 states that the granting of a petition is discretionary and ordinarily will be granted only for compelling reasons. However, there certainly are *no compelling reasons* in this case. With respect to the issues claimed by the petition, no important federal questions

were decided by the Kentucky Court of Appeals. Rather, state substantive law was construed, applied and followed by the Kentucky Court of Appeals decision.

Not only does the Kentucky Court of Appeals decision lack any conflict with the opinions of this Court, the decision clearly does not determine the federal question for which the petition seeks a writ. Indeed, a principal purpose for this Court's use of certiorari jurisdiction is to resolve conflicts among the federal circuits and state courts concerning the meaning of provisions of federal law. *Braxton* v. *U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991). The purpose of this Court's certiorari jurisdiction is not merely to change the outcomes of state cases having no federal impact. There is no conflict in this case despite the petitioner's persistent misreliance upon an inapplicable body of law, namely special assessments for special benefits.

The petitioner attempts to create conflict and federal question jurisdiction where there is none. For example, the petitioner erroneously criticizes the Kentucky Court of Appeals decision as disobeying 5th and 14th Amendment due process, equal protection and takings considerations. The vehicle that the petitioner uses for these assertions is *Village of Norwood* v. *Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), an Ohio special assessment street construction case which held that special assessments require special benefits. The petitioner then argues that the Kentucky Court of Appeals decision conflicts with the special benefits requirements of *Village of Norwood*. Despite the petitioner's misreliance on special assessments and special benefits law, it is obvious that *Village of Norwood* and the 5th and 14th Amendments do not appear in the Kentucky Court of Appeals decision. Moreover, *Village of Norwood* and special assessments law are wholly inapplicable to this case. Nor was a 5th or 14th Amendment discussion necessary to the court's decision since ample state law ex-

isted for the court to follow, particularly the established state rule of *Curtis, supra.* Clearly, state substantive law controlled the outcome of this case, not the issues of *Village of Norwood* or the 5th or 14th Amendments. In construing the Authority's statutes and regulations, there simply was no reason for the Kentucky Court of Appeals to engage in a determination of federal constitutional law or to discuss whether the Authority's fees may violate *Village of Norwood* or any other special assessments law. Moreover, the Kentucky Court of Appeals decision lacks any national or federal significance worthy of this Court's limited resources.

III. THE KENTUCKY COURT OF APPEALS CORRECTLY RELIED UPON AN UNBROKEN LINE OF STATE AUTHORITY AND PROPERLY DECIDED THE CASE.

The petitioner erroneously equates the Authority's water use fees with special assessments for special benefits, as in neighborhood street construction cases. In following an unbroken line of state case law, however, the Kentucky Court of Appeals properly held that the water use fees are valid under the state's police power.

Since 1958 the law in Kentucky is that an area which lies within a watershed derives benefits from watershed projects through the general improvement of conditions or health, comfort and convenience and the resulting general enhancement of values in the area. *Curtis, supra,* 311 S.W.2d at 382.

In 1964 the *Curtis* rule was followed in *Woolsley* v. *Big Reedy Creek Watershed, supra,* wherein the court construed state watershed conservation statutes enacted in the 1950's by the Kentucky legislature.[4] The court re-

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[4]Contrary to the petitioner's assertions, watershed management concepts have existed in Kentucky at least four decades as evidenced by the state legislature's enactments of watershed conservancy statutes. Such statutes were involved in *Woolsley v Big Reedy Creek Watershed, supra.*

jected the plaintiffs' claim that a watershed project could not benefit them.

> [T]hey do not show that their property will not be benefited through a general enhancement of values in the district, which benefit has been held to be a sufficient basis for imposing a share of the cost of a watershed improvement project. *See Curtis* v. *Louisville & Jefferson County Metropolitan Sewer District,* Ky., 311 S.W.2d 378.

Id., 383 S.W.2d at 137. In 1989, the *Curtis* rule was followed in *Long Run Baptist Association, supra,* 775 S.W.2d 520, 522 (1989).

> [A]ppellants argue that there are some property owners who receive no benefit from the [water drainage] plan because they constructed their own system or because the storm water run off drains from their property directly into the Ohio River. However, similar arguments were presented in and rejected in *Curtis* v. *Louisville and Jefferson County Metropolitan Sewer District,* 311 S.W.2d 378 (1958), where property owners argued that KRS 76.260 (which was later repealed) was unconstitutional because it established a conclusive presumption that all land within a designated surface drainage area would receive some benefit. Because some property was at an elevation high enough to provide a vested right to the free flow of surface water, property owners argued that such property could not be benefited by the improvement. The court disagreed.
>
> > We think that in the case of a surface drainage improvement, any property that geographically is a part of the watershed or drainage basin may properly be considered to be benefited by the project through the general improvement of conditions of health, comfort and convenience in the area and the general enhancement of values in the area. The circuit court held that all property in the area could

be deemed to be benefited, and we affirm that holding.

Id. at 382.

In correctly applying the common law rule of these state cases, the Kentucky Court of Appeals concluded that the petitioner's actual use of the basin's watershed and its discharge into it was a sufficient basis under state law for assessment of the water use fees. Moreover, contrary to the petitioner's claim, Kentucky is not the only state to adopt user fees to pay for watershed management and protection and to hold that the fees are *not* to be viewed as special assessments requiring special benefits. In *Teter* v. *Clark County*, 104 Wash.2d 227, 704 P.2d 1171 (1985), the Washington Supreme Court similarly held that under the state's police powers a water management department may properly be funded by user fees despite assertions that properties do not receive "special benefits" as may be required under a special assessments case. The court correctly noted that under a police power analysis "[t]he special benefit idea does not enter into the picture at all." *Id.* at 1176. Indeed, the Authority has long maintained that its fees are based on a valid exercise of its police powers. Such police power is an essential attribute of government.[5] *Roe* v. *Commonwealth*, Ky., 405 S.W.2d 25, 27 (1966). There is little reason for this Court to review the Commonwealth's valid exercise of its police powers, particularly where the Kentucky Court of Appeals decision did not determine any federal law issues.

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[5]The petitioner erroneously claims that the Authority assembled police power arguments in support of the fees "[a]s an apparent afterthought, subsequent to the trial court opinion...." Pet. Br., p. 22. However, the police power was expressly argued by the Authority in the trial court as evidenced by pages 40 - 41 of its trial court brief, entitled "*The Tier I Fees Are a Valid Exercise of the Authority's Police Powers.*"

IV. EVEN IF FEDERAL QUESTION JURISDICTION EXISTED, THE ISSUES IN THIS CASE LACK SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S REVIEW.

Aside from the jurisdictional defect under the rule of *Michigan* v. *Long, supra,* that the state court decision lacks the federal question alleged by the petitioner, the issues in the case lack any importance which would warrant this Court's investment of its valuable and limited judicial resources. Kentucky's highest court has twice rejected this case by declining transfer of the case (*see* Resp. App., p. 1a) and denying discretionary review. Even if there were bona fide federal issues in this case, which there are not, it would seem anomalous for this Court to accept the case when the Kentucky Supreme Court has itself twice declined review. Certainly, this case which was decided on independent and adequate state ground cannot be more important to this Court than to the Kentucky Supreme Court. Moreover, the only federal question determinations in the Kentucky Court of Appeals decision are those dealing with the petitioner's Commerce and Supremacy Clause arguments to which the court stated "[w]e find no merit." Opinion, Pet. App., p. 7a. Neither of those issues is included in the petition and the law on those issues is nevertheless well settled.

V. THE PETITIONER'S ARGUMENTS MISCONSTRUE THE KENTUCKY COURT OF APPEALS OPINION.

The petitioner claims that the "Supreme Court of Kentucky" [sic] denied petitioner the right to question the fees and benefits. Pet. Br., p. 12. To the contrary, the petitioner initiated this state court action and has had nearly three years of involvement in litigating the issues. The petitioner has simply lost on the merits and the Kentucky Supreme Court denied the petitioner's motion for discretionary review. Also, the petitioner erroneously asserts that the Kentucky Court of Appeals' opinion "establishes"

law. Pet. Br., p. 12. However, the Court of Appeals decision properly followed state precedent and determined that the petitioner was responsible for payment for its *actual use* of the water resources of the Kentucky River basin under the Authority's statutes and regulations.

Contrary to what the petitioner claims, the fees charged to the City for its use of the basin's waters are not simply a function of the City's geographical location within the basin. Rather, it is undeniable that the petitioner indeed *uses* the basin's water and impacts the basin's water supply and quality. On a daily basis the petitioner withdraws more than 3 million gallons of water from the basin's waters and discharges its used water into the basin. It is reasonable therefore for the petitioner to pay water use fees which in turn are used for watershed protection and management. It is anomalous for the petitioner to claim that no lawful and rational relationship exists between the fees assessed and the petitioner's use and discharge into the river basin. The Court of Appeals construction of the Authority's water use fee statutes and regulations shows that they are reasonably related to the Commonwealth's interest of protecting and conserving the water resources of the Kentucky River basin. *See Portwood* v. *Falls City Brewing Company, supra,* at 536; *Skidmore* v. *City of Elizabethtown, supra,* at 5.

VI. THE PETITION ATTEMPTS TO CREATE FEDERAL ISSUES AND CONFLICT WHERE NONE EXIST.

The petitioner attempts to create conflict between federal and state law. Despite that the state court opinion rests on independent and adequate state law ground, the petitioner nonetheless argues that *Village of Norwood, supra,* an 1898 special assessment case, conflicts with the state court's decision. However, the petitioner makes meritless arguments to avoid compliance with state law and to avoid paying legitimate water use fees.

The Kentucky Court of Appeals correctly recognized the inapplicability of the petitioner's 5th and 14th Amendment arguments and properly decided the case based upon substantive Kentucky precedents. The rule founded in *Curtis, supra,* was followed by *Woolsley* v. *Big Reedy Creek Watershed, supra* and *Long Run Baptist Assoc., supra.* The Kentucky Court of Appeals decision correctly applied and followed this established state rule. Contrary to the petitioner's claims, the Kentucky Court of Appeals opinion did not "establish" a rule or conclusive presumption. Pet. Br., p. 10. Rather, the court correctly applied substantive state law which has existed in this Commonwealth for 39 years.

Clearly, the law of special assessments for special benefits does not apply to this case in lieu of *Curtis.* The fees in this case are based upon the Authority's exercise of its legislatively granted police powers. The special assessments case of *Village of Norwood* does not change this result nor is it in conflict with the Kentucky Court of Appeals decision. In *Norwood* the property of an abutting landowner was levied upon for street construction improvements. However, it is plainly obvious that no such facts exist in this case. Moreover, it is inconsequential that a Kentucky special assessments case following *Norwood* likewise held that public street construction could lead to special assessments on adjoining and benefited property. *Barfield* v. *Gleason,* 111 Ky. 491, 63 S.W.2d 964 (1901). It too does not alter the outcome of this case. The third case erroneously relied upon by the petitioner is *Casey* v. *Richland County Council,* 282 S.C. 387, 320 S.E.2d 443 (1984), which under the South Carolina constitution held invalid on equal protection grounds a county water and sewer charge where the plaintiff already was being serviced and charged by the City of Columbia and could not use the county's system. Since the plaintiff was not in the county system and could not use the county system, the

South Carolina court viewed the county's charge as general revenue raising and therefore an impermissible tax. However, this case is likewise inapplicable. Unlike the plaintiff in *Casey*, the petitioner herein actually uses the waters of the Kentucky River basin.

The case at bar is not one involving special assessments for special benefits, nor does it involve taxes. Neither *Village of Norwood* nor any other cases cited by the petitioner are applicable. Nor does the Kentucky Court of Appeals decision in any way involve the petitioner's asserted federal constitutional concerns. There is no basis for certiorari jurisdiction in this case.

* * *

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK B. BATES, *Counsel of record*
DONALD S. DOTT, JR.
SUSAN ROSE GREEN
Natural Resources and Environmental
Protection Cabinet
Office of Legal Services
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-5576
Counsel for Respondents

APPENDIX

SUPREME COURT OF KENTUCKY

95-SC-52-T

KENTUCKY RIVER AUTHORITY,
PHILLIP J. SHEPHERD,
CHARLES W. CARR,
TIM DORMAN,
JUDGE W. NEAL CASSITY,
DR. DONALD C. HANEY,
MARTIN HOWARD LOWRY,
EDWARD FOREE,
GREG GINTER,
THOMAS M. JONES,
RALPH E. MCCLANAHAN, and
BETTYE F. WHITAKER - - - - - *Movants*

v.

CITY OF DANVILLE, KENTUCKY - - *Respondent*

Boyle Circuit Court
Hon. Stephen M. Shewmaker, Judge
94-CI-278

ORDER DENYING TRANSFER

Movants motion for transfer of the above styled action from the Court of Appeals of Kentucky to the Supreme Court of Kentucky is denied.

ENTERED: March 14, 1995

/s/ Robert F. Stephens
CHIEF JUSTICE